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CLEARLY ESTABLISHED ENOUGH: THE FOURTH CIRCUIT'S NEW APPROACH TO QUALIFIED IMMUNITY IN *BELLOTTE V. EDWARDS*[*]

INTRODUCTION

When should government officers be expected to know that they are breaking the law? Potential life-or-death situations develop quickly, and what at first looks like a reasonable decision may have terrible, unintended consequences. The qualified immunity doctrine acknowledges this difficulty by protecting government officers from civil liability when they violate an individual's constitutional or statutory rights.[1] Immunity does not apply, however, if the right at issue has been "clearly established" such that a reasonable person should have known the conduct to be unlawful.[2] This analysis weighs an individual's interest in vindicating his rights against the government's interest in allowing public officials to effectively perform their duties without fear of frivolous lawsuits.[3] As the Fourth Circuit noted in deciding the recent case of *Bellotte v. Edwards*,[4] "[q]ualified immunity provides critically important protection when a reasonable decision in the line of duty turns out to be a bad guess."[5] Given the difficult and often dangerous jobs government officers have, this all makes sense. Problems arise, however, when courts must determine how "clearly established" a right must actually be to overcome qualified immunity.[6] Unfortunately, the United States Supreme Court's guidance on the subject has been anything but clear. In order to find a clearly established right, the Court has seesawed

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1. *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).
2. *Id.*
3. Davis v. Scherer, 468 U.S. 183, 195 (1984).
4. 629 F.3d 415 (4th Cir. 2011).
5. *Id.* at 427.
6. The qualified immunity analysis has traditionally been a two-pronged inquiry: courts must first determine if a constitutional right has been violated and, if so, whether the right was clearly established at the time. Saucier v. Katz, 533 U.S. 194, 201 (2001), *overruled in part by* Pearson v. Callahan, 555 U.S. 223, 236 (2009) (holding that this sequence "is often appropriate, [but] it should no longer be regarded as mandatory"). This Recent Development focuses on the second prong. For a thorough analysis of *Pearson*, see generally Nancy Leong, *Rethinking the Order of Battle in Constitutional Torts: A Reply to John Jeffries*, 105 NW. U. L. REV. 969 (2011).

between requiring precedent with a high degree of factual similarity to the case at hand and allowing broader statements of law to suffice. No iteration of the test explicitly overrules any other, and the Court has never fully explained how these tests are supposed to fit together. This has resulted in a wide variety of approaches across jurisdictions; as one commentator puts it, "the Constitution means one thing in Alabama and another in California, at least in the context of whether victims of abusive government officials are entitled to recover damages."[7]

Bellotte illustrates a shift in the Fourth Circuit's approach to qualified immunity. Before this case, the court generally required precedent with a very high level of factual similarity to overcome a qualified immunity defense. West Virginia police, acting on the mistaken belief that a resident in the Bellottes' home possessed or had produced child pornography, executed a search warrant on the home without first knocking and announcing their presence.[8] The Fourth Circuit held that exigent circumstances did not justify the entry and therefore the police officers had violated the Bellottes' Fourth Amendment rights.[9] The court denied the officers qualified immunity from the family's § 1983[10] claim for damages, holding that the officers had violated clearly established law.[11] No precedent with similar factual circumstances to this case was available.[12] Instead, the Fourth Circuit held that the officers violated a clearly established

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7. Craig T. Jones, Hope *for Civil Rights*, TRIAL, Apr. 2004, at 38, 38–39. Professor Saiman has described qualified immunity as being in "a perpetual state of crisis." Chaim Saiman, *Interpreting Immunity*, 7 U. PA. J. CONST. L. 1155, 1155 (2005). Although the Supreme Court has frequently addressed the issue, "federal reporters are crammed with dissents and en banc decisions taking issue over the proper scope and role of qualified immunity." *Id.* at 1156.

8. *Bellotte*, 629 F.3d at 418.

9. *Id.* at 427.

10. 42 U.S.C. § 1983 (2006) provides that

> [e]very person who . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

Similarly, a *Bivens* action may be brought when a federal officer is involved. Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 397 (1971).

11. *Bellotte*, 629 F.3d at 424. The Bellottes also brought claims for excessive force, and the officers received immunity for all but one of those claims about which there was a factual dispute. *Id.* at 426. This Recent Development addresses only the Fourth Amendment claim regarding the no-knock entry.

12. *See id.* at 424.

right by analogizing to cases addressing comparable, although distinguishable, situations.[13]

This Recent Development argues that the Fourth Circuit was correct to adopt such an approach to qualified immunity. Although not explicitly spelled out by the court, this approach presents a reasonable way to balance the interests at stake in this profoundly unsettled area of law. *Bellotte* and subsequent Fourth Circuit decisions demonstrate that officers may be on notice that they are violating clearly established rights despite a lack of precedent directly on point. While beneficial to plaintiffs, this approach is not necessarily so loose as to impose an unfair burden on government officers who find themselves in unique, potentially dangerous situations where the law truly provides no clear guidance. Because qualified immunity is generally decided by pre-trial motion, this approach will also likely permit more legitimate civil claims to survive summary judgment.[14] Such an approach furthers at least two important policy considerations. First, victims of government abuse will have a better opportunity to recover damages for the violation of their rights, thus promoting government accountability and avoiding unconscionable results. Those who have been terribly injured by a government officer should not be denied their day in court simply because a virtually identical case has not been previously decided. Second, this approach will allow the threat of civil liability to play a bigger role in deterring unconstitutional no-knock entries in the wake of *Hudson v. Michigan*,[15] where the Supreme Court did away with the exclusionary rule in such cases.[16]

Analysis proceeds in five parts. Part I sets forth the facts and central holdings of *Bellotte*. Part II briefly discusses the Supreme Court's seemingly contradictory rulings on qualified immunity and the ensuing divergence among the circuits. Part II then notes how the Fourth Circuit generally addressed clearly established rights before *Bellotte*. Part III analyzes how *Bellotte* illustrates a shift in the Fourth Circuit's approach to qualified immunity and argues that it is a proper way to handle the issue. Part IV discusses the important policy

13. *See id.* at 431–32 (Wynn, J., dissenting in part).

14. *See* Harlow v. Fitzgerald, 457 U.S. 800, 813 (1982) ("[P]ublic policy at least mandates an application of the qualified immunity standard that would permit the defeat of insubstantial claims without resort to trial."). As will be made clear below, many claims that never make it to trial are far from insubstantial. *See* John C. Jeffries, Jr., *What's Wrong With Qualified Immunity?*, 62 FLA. L. REV. 851, 866–67 (2010).

15. 547 U.S. 586 (2006).

16. *Id.* at 594.

objectives this new framework promotes by allowing more legitimate claims of government abuse to survive summary judgment. Part V addresses problems this new approach may present, namely the potentially higher burden on government officers performing difficult and dangerous jobs. This Recent Development then concludes that the Fourth Circuit's new approach, while imperfect, is still a preferable way to address qualified immunity until the Supreme Court provides further guidance.

I. *BELLOTTE V. EDWARDS*

On May 31, 2007, a clerk at a Wal-Mart in Winchester, Virginia, insisted on inspecting photos printed there by Sam Bellotte.[17] Mr. Bellotte surrendered the photos after admitting that some contained nudity and then left the store.[18] Upon noticing that one photograph depicted male genitalia near what appeared to be a child's face, Wal-Mart employees contacted the police.[19] The Jefferson County Sheriff's Department took over the investigation after learning that Mr. Bellotte was a resident of Jefferson County, West Virginia.[20] After reviewing the photo and discovering that Mr. Bellotte and his wife, Tametta, both had concealed carry permits, Detective Tracy Edwards secured a search warrant for the Bellotte residence and arranged for a special operations team to assist in executing the search warrant.[21]

Around 10:15 p.m., the team—armed with pistols, flashlights, and "hooligan" pry bars[22]—entered the house without alerting the Bellottes to its presence and purpose.[23] The team first encountered the Bellottes' teenage son, E.B., whom they "subdued and handcuffed."[24] The Bellottes' young daughter, C.B., was awakened and led downstairs without handcuffs.[25] When the police reached Mrs. Bellotte's bedroom, she "ran screaming" to get her gun before being

17. *Bellotte*, 629 F.3d at 418.
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.* Edwards was accompanied by the Jefferson County Special Operations Team, or "SORT Team." *Id.*
22. Officially called a Halligan bar, these devices are widely used by law enforcement and firefighters for forcible entry. FIRE ENGINEERING'S HANDBOOK FOR FIREFIGHTER I AND II, at 215 (Glenn Corbett ed., 2009).
23. *Bellotte*, 629 F.3d at 418.
24. *Id.*
25. *Id.*

wrestled to the ground and handcuffed.[26] Mr. Bellotte was not in the house that night.[27] After learning of these events, he showed police evidence proving that the person in the picture was not a child, but a thirty-five-year-old woman living in the Philippines.[28] No charges were ever filed against Mr. Bellotte.[29]

Mrs. Bellotte and her children sued Detective Edwards and the other officers involved under state law and 42 U.S.C. § 1983.[30] The § 1983 claims alleged that the officers violated the Bellottes' Fourth Amendment rights to be free from unreasonable searches and excessive force.[31] The district court denied the defendants qualified immunity as to the no-knock entry, and the Fourth Circuit affirmed.[32] Generally, police officers must knock and announce their presence and purpose before executing a warrant (the "knock-and-announce rule").[33] To bypass the knock-and-announce rule, a court must make a fact-specific inquiry and find that the surrounding circumstances justified the no-knock entry.[34]

Here, the Fourth Circuit first considered whether there was a Fourth Amendment violation and concluded that there was no basis to excuse the no-knock entry.[35] "Not a single one of the officers' proffered rationales provides a reasonable, particularized basis to justify their conduct," Judge Wilkinson wrote for the majority.[36] The officers did not initially seek a no-knock warrant, nor did they discover any new information after obtaining the warrant that would

26. *Id.* at 418–19.
27. *Id.* at 419.
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.* The court did not review the district court's dismissal of the Bellottes' claims that "the search warrant was invalid and that certain aspects of the execution of the warrant were unreasonable." *Id.* The court granted the officers qualified immunity as to Mrs. Bellotte's and C.B.'s excessive force claims but denied immunity as to E.B.'s excessive force claim. *Id.* at 426. These holdings are beyond the scope of this Recent Development.
33. Richards v. Wisconsin, 520 U.S. 385, 387 (1997).
34. *Id.* at 394. No-knock entries are only allowed under exigent circumstances where police "have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence." *Id.* "This requirement serves the valuable ends of '(1) protecting the safety of occupants of a dwelling and the police by reducing violence; (2) preventing the destruction of property; and (3) protecting the privacy of occupants.' " *Bellotte*, 629 F.3d at 419 (quoting Bonner v. Anderson, 81 F.3d 472, 475 (4th Cir. 1996)).
35. *Bellotte*, 629 F.3d at 419–20.
36. *Id.* at 424.

have supported a no-knock entry.[37] Unlike other Fourth Circuit cases where a suspect's violent criminal history,[38] threatened suicide,[39] or illegal possession of firearms[40] justified a no-knock entry, "the officers here can point to not even one of these particularized indicia of risk."[41] The court explained that the suspected crime of possessing or producing child pornography, while "utterly deplorable," was not one inherently associated with violence, nor did the Bellottes themselves appear to have a violent disposition.[42] The court characterized the officers' argument that sex offenders are more prone to suicide as speculative and stated that the generalized nature of the claim could not establish "a particularized basis that Mr. Bellotte presented an imminent suicide risk."[43]

The officers finally argued that the presence of firearms, combined with the suspected crime, created "the potential for a perfect storm of violence."[44] The court rejected this argument as well. The Fourth Circuit had previously held that the presence of a lawfully owned firearm by itself could not allow police to dispense with the knock-and-announce requirement and that there must still be a particularized finding "that someone inside the home might be willing to use it."[45]

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37. *Id.* at 421.

38. *Id.* at 420–21 (citing United States v. Grogins, 163 F.3d 795, 799 (4th Cir. 1998) (holding that a no-knock search was justified because the subject of the investigation had a violent criminal history involving firearms and had promised to do whatever was necessary to avoid going back to prison)).

39. *Id.* at 423 (citing Cloaninger v. McDevitt, 555 F.3d 324, 334 (4th Cir. 2009) (holding that suicide threats by a suspect supported a finding of exigency)).

40. *Id.* (citing United States v. Wardrick, 350 F.3d 446, 452 (4th Cir. 2003) (holding that illegal possession of firearms by a convicted felon justified the issuance of a no-knock search warrant)).

41. *Id.* at 421.

42. *Id.* at 420. Judge Wynn's dissent points out that the suspected crime was *use of a minor* in producing pornography, not possession of child pornography. *Id.* at 429 (Wynn, J., dissenting in part). Detective Edwards testified that she believed a child victim was in the Bellottes' home, and that this presented a dangerous situation. *Id.* The officers, however, did not raise this issue on appeal, a fact that did not escape the majority's notice: "[W]e cannot adopt an argument too speculative for even the officers in this appeal to make." *Id.* at 424 n.2 (majority opinion).

43. *Id.* at 422. The court also noted that "cases addressing the justifications for no-knock entries speak primarily in terms of officer safety." *Id.*

44. *Id.* at 423 (quoting Brief of Appellants/Cross-Appellees at 27, *Bellotte*, 629 F.3d 415 (No. 10-1115)) (internal quotation marks omitted).

45. *Id.* (quoting Gould v. Davis, 165 F.3d 265, 272 (4th Cir. 1998)) (internal quotation marks omitted). The majority further stated, "If the officers are correct, then the knock and announcement requirement would never apply in the search of anyone's home who legally owned a firearm." *Id.* (quoting Gould v. Davis, 165 F.3d 265, 272 (4th Cir. 1998))

In addition to arguing that no Fourth Amendment violation had occurred, the officers argued they were entitled to qualified immunity because they could not reasonably have been expected to know that they were violating the Bellottes' constitutional rights.[46] Again, the court disagreed. Although no precedent existed dealing with these exact circumstances,

> [t]he absence of "a prior case directly on all fours" here speaks not to the unsettledness of the law, but to the brashness of the conduct. Because "a man of reasonable intelligence would not have believed that exigent circumstances existed in this situation," we affirm the district court's holding that this no-knock entry violated the Bellottes' clearly established constitutional rights and does not warrant an award of qualified immunity.[47]

To this point, Judge Wynn filed a dissenting opinion. He first noted that the officers believed a child victim to be *inside* the home, which Detective Edwards thought would produce a dangerous situation.[48] He then argued that in the absence of case law specifically addressing "the context of a child abuse investigation in which the child victim and multiple firearms are believed to be in the suspect's custody," the officers could not reasonably be expected to know their conduct was unlawful.[49]

II. THE SUPREME COURT COMPLICATES QUALIFIED IMMUNITY, AND THE CIRCUITS RESPOND

Despite numerous efforts, the Supreme Court has not provided a clear, uniform framework to determine when a right has been clearly established. This has resulted in a striking variety of attempts by the circuits to make sense of it all. A better understanding of the Fourth Circuit's decision in *Bellotte* requires at least a brief overview of how the analysis for finding clearly established rights has become so muddled. This Part discusses the Supreme Court's evolving analysis for finding clearly established rights and the circuits' diverging

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(internal quotation marks omitted). The *Bellotte* court also noted how the officers admitted at oral argument that "most people in West Virginia have guns." *Id.*

46. *Id.* at 419 (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).

47. *Id.* at 424 (quoting Bailey v. Kennedy, 349 F.3d 731, 743 (4th Cir. 2003); Pinder v. Johnson, 54 F.3d 1169, 1173 (4th Cir. 1995) (en banc)).

48. *Id.* at 429 (Wynn, J., dissenting in part).

49. *Id.* at 432.

responses. It then focuses on the Fourth Circuit's approach to finding clearly established rights before *Bellotte*.

A. *Finding "Clearly Established" Rights in the Supreme Court*

In *Harlow v. Fitzgerald*,[50] the Supreme Court first adopted a standard of objective reasonableness in qualified immunity analysis: qualified immunity would only apply in light of the "objective reasonableness of an official's conduct, as measured by reference to clearly established law."[51] Five years later in *Anderson v. Creighton*,[52] an FBI agent made a warrantless entry into a family's home on the mistaken belief that a suspect in a recent bank robbery was inside.[53] The Eighth Circuit denied the agent qualified immunity on the grounds that the right to be free from a warrantless entry absent exigent circumstances was clearly established, but the court did not discuss the particular circumstances the agent faced.[54] The Supreme Court reversed, explaining that "the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right."[55] Otherwise, plaintiffs would be able to undermine this important protection for government officers "by alleging violation of extremely abstract rights."[56] The Court noted, however, "[t]his is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it is to say that in the light of pre-existing law the unlawfulness must be apparent."[57]

The Court would eventually move away from this preference for more highly particularized precedent. In *United States v. Lanier*,[58] the Court held that "general statements of the law are not inherently incapable of giving fair and clear warning" to an officer that her conduct is impermissible, even when a court has not yet addressed the

50. 457 U.S. 800 (1982).
51. *Id.* at 818.
52. 483 U.S. 635 (1987).
53. *Id.* at 637.
54. *Id.* at 640–41.
55. *Id.* at 640.
56. *Id.* at 639. Such an approach "would effectively eliminate the defense of qualified immunity from the law of constitutional torts." Jeffries, *supra* note 14, at 856.
57. *Anderson*, 483 U.S. at 640 (citation omitted).
58. 520 U.S. 259 (1997).

specific conduct at issue.[59] Five years later, the trend continued in *Hope v. Pelzer*.[60] Larry Hope was a former Alabama prison inmate who got into a physical altercation with a guard while working on a chain gang.[61] He was transported back to the prison, where he was handcuffed to a hitching post and made to remove his shirt.[62] Hope remained there for seven hours, during which time he suffered severe sunburn and muscle cramps, was denied bathroom breaks, was provided little water, and was taunted by a guard.[63] Hope sued under § 1983 for violation of his Eighth Amendment right to be free from cruel and unusual punishment.[64] He relied on two Eleventh Circuit cases to show that the prison guards had violated a clearly established right[65]: *Ort v. White*,[66] which suggested in dicta that it would be unconstitutional to deny an inmate water for refusing to work once taken back to the prison,[67] and *Gates v. Collier*,[68] which held that hitching inmates to a fence for long periods of time violated the Eighth Amendment.[69] The district court granted the defendant guards qualified immunity, and the Eleventh Circuit affirmed, finding that, "[t]hough analogous, the facts in *Gates* and *Ort* are not 'materially similar' to Hope's situation."[70]

Relying on its holding in *Lanier*, the Supreme Court reversed.[71] Justice Stevens' majority opinion rejected the Eleventh Circuit's requirement of "materially similar" precedent,[72] explaining that "officials can still be on notice that their conduct violates established law *even in novel factual circumstances*."[73] The Court noted that

59. *Id.* at 271.
60. 536 U.S. 730 (2002).
61. *Id.* at 734.
62. *Id.*
63. *Id.* at 735.
64. *Id.*
65. *Id.* at 736.
66. 813 F.2d 318 (11th Cir. 1987).
67. *Id.* at 326.
68. 501 F.2d 1291 (5th Cir. 1974). In 1980, the Fifth Circuit was split into two circuits, the Eleventh and the "new Fifth." Bonner v. Pritchard, 661 F.2d 1206, 1207 (11th Cir. 1981). All Fifth Circuit cases decided before October 1, 1981, are binding precedent in the Eleventh Circuit. *Id.*
69. *Gates*, 501 F.2d at 1306.
70. Hope v. Pelzer, 240 F.3d 975, 981 (11th Cir. 2001), *rev'd*, 536 U.S. 730 (2002). The Eleventh Circuit distinguished *Ort* by pointing out that the prisoner in that case had been denied water at a worksite until he resumed working. *Id. Gates* was distinguishable because it involved a greater, systemic effort to reform the prison system. *Id.*
71. Hope v. Pelzer, 536 U.S. 730, 746 (2002).
72. The Court said that the Eleventh Circuit's decision "exposes the danger of a rigid, overreliance on factual similarity." *Id.* at 742.
73. *Id.* at 741 (emphasis added).

"materially similar" precedent can be especially helpful in showing a right to be clearly established, but it is not necessary.[74]

The *Hope* doctrine has been criticized as "hopelessly ambiguous," sounding reasonable in the abstract but providing little practical guidance.[75] Perhaps with this in mind, the Court revisited qualified immunity two years later in *Brosseau v. Haugen*.[76] There, Officer Brosseau shot Kenneth Haugen as he fled from the police in a vehicle.[77] Brosseau thought Haugen posed a danger to other officers on foot and anyone else in the immediate area,[78] even though, as Justice Stevens noted in dissent, at the time of the shooting the vehicle "was immobile, or at best, had just started moving."[79] Haugen sued under § 1983 for a violation of his Fourth Amendment right to be free from excessive force.[80] The Ninth Circuit denied qualified immunity, finding that *Tennessee v. Garner*[81] and *Graham v. Connor*[82] gave Brosseau "fair warning" that shooting Haugen would violate clearly established constitutional rights.[83] The Supreme Court reversed, holding that this precedent was "cast at a high level of

74. *Id.* In response to *Hope*, the Eleventh Circuit adopted a new framework for this analysis, separating allegedly unconstitutional conduct into three categories of precedent: a category of "obvious clarity" where no case law is needed to clearly establish a right; a category of "broad statements of principle . . . not tied to particularized facts"; and a category for "precedent that is tied to the facts." Vinyard v. Wilson, 311 F.3d 1340, 1350–52 (11th Cir. 2002) (emphasis omitted). This structure has received praise from commentators. *See* Erwin Chemerinsky & Karen Blum, *Fourth Amendment Stops, Arrests and Searches in the Context of Qualified Immunity*, 25 TOURO L. REV. 781, 791–92 (2009); Jeffries, *supra* note 14, at 853. Professor Jeffries, however, notes that none of the categories are "self-executing. Indeed, all require evaluative judgments—including, for example, just how textually specific 'obvious clarity' must be . . . ." Jeffries, *supra* note 14, at 853. Therefore, "even this well-crafted test for 'clearly established' law will be fodder for argument, unclear in application, and unsuccessful in predicting results." *Id.* at 854.

75. Richard B. Golden & Joseph L. Hubbard, Jr., *Section 1983 Qualified Immunity Defense:* Hope*'s Legacy, Neither Clear nor Established*, 29 AM. J. TRIAL ADVOC. 563, 584 (2006). *Lanier* has been similarly criticized. Golden and Hubbard compare the Supreme Court's analysis in *Lanier* to Justice Potter Stewart's "I know it when I see it" obscenity analysis in his concurring opinion in *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964). Golden & Hubbard, *supra*, at 584.

76. 543 U.S. 194 (2004) (per curiam).

77. *Id.* at 196–97.

78. *Id.* at 197. There was "a felony no-bail warrant out for Haugen's arrest on drug and other offenses." *Id.* at 195. Officer Brosseau arrived at the scene after hearing a report that men were fighting in Haugen's mother's yard. *Id.*

79. *Id.* at 206 n.4 (Stevens, J., dissenting).

80. *Id.* at 194–95 (per curiam).

81. 471 U.S. 1 (1985).

82. 490 U.S. 386 (1989).

83. *Brosseau*, 543 U.S. at 199. *Garner* holds that police may only use deadly force to prevent a suspect from escaping upon "probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others." *Garner*, 471 U.S. at 11.

generality"[84] and a "more particularized" standard must be met to find a clearly established right.[85] The Court noted that such general rules can suffice without relevant precedent in an "obvious case," citing *Hope* as an example.[86] But any discussion of *Hope*'s approach to finding clearly established rights, or what else might constitute an obvious case, ended there. The Court concluded that *Brosseau* did not fall into its "obvious" category and that no precedent "squarely govern[ed]" the issue at hand.[87]

B. *The Circuits Attempt to Reconcile* Hope *and* Brosseau

It is unclear how the Eleventh Circuit's "rigid gloss" on qualified immunity rejected in *Hope* is any different than the need for precedent that "squarely governs" as called for by *Brosseau*.[88] Strictly applying *Hope*'s standard to *Brosseau*'s facts, it seems that the more general rule in *Garner* should have sufficed to find Haugen's Fourth Amendment right in that situation to be clearly established.[89] This apparent inconsistency has led to a variety of attempts among the circuits to reconcile the two cases.[90] The Sixth Circuit has explained how *Hope* and *Brosseau* represent "two paths" to finding clearly established rights: one where the constitutional violation is sufficiently obvious such that a body of relevant case law is unnecessary and one where the violation is shown by "particularized" precedent.[91] The Eighth Circuit has also recognized the validity of both standards, while arguably sidestepping *Brosseau*'s preference for

84. *Brosseau*, 543 U.S. at 199.

85. *Id.* (citations omitted) (internal quotation marks omitted).

86. *Id.*

87. *Id.* at 201. The Court did not rule on whether Officer Brosseau's conduct actually violated Haugen's constitutional rights: "We express no view as to the correctness of the Court of Appeals' decision on the constitutional question itself. We believe that, however that question is decided, the Court of Appeals was wrong on the issue of qualified immunity." *Id.* at 198.

88. Chemerinsky & Blum, *supra* note 74, at 790; *see also* Golden & Hubbard, *supra* note 75, at 599 n.222 ("*Brosseau*'s ultimate holding seems to fly in the face of the language in *Hope* that accused the Eleventh Circuit of placing a 'rigid gloss on the qualified immunity standard . . . [that] is not consistent with our cases.' " (quoting Hope v. Pelzer, 536 U.S. 730, 739 (2002))).

89. *See* Golden & Hubbard, *supra* note 75, at 598–99. As a practical matter, plaintiffs generally point to *Hope*, and defendants point to *Brosseau* and other cases requiring a showing of more particularized precedent. Chemerinsky & Blum, *supra* note 74, at 790.

90. The circuits have taken differing approaches to qualified immunity beyond reconciling these two cases. *See* Jeffries, *supra* note 14, at 850–67.

91. *See* Golden & Hubbard, *supra* note 75, at 600–02 (discussing Lyons v. City of Xenia, 417 F.3d 565 (6th Cir. 2005)).

factually similar precedent in favor of *Hope*'s broader reach.[92] Conversely, the Ninth Circuit has fully embraced *Brosseau*, mostly ignoring *Hope* and the inherent tension between the two cases.[93]

Each approach has its strengths and weaknesses. The Sixth Circuit has made a good faith attempt to reconcile them, but the test for an "obvious" case remains undefined beyond whether a court finds any given case to be as shocking as *Hope*.[94] The Eighth Circuit at least pays lip service to both *Hope* and *Brosseau* but suffers by ultimately ignoring *Brosseau*, the most recent Supreme Court decision on the subject that seems clearly aimed at reining in *Hope*. While the Ninth Circuit keeps things relatively simple by ignoring *Hope*, the case remains good law. Moreover, complete reliance on factually similar precedent runs the risk of leaving victims of even the most extreme governmental abuse without a remedy—perhaps the main reason the Court rejected the Eleventh Circuit's rigid approach in the first place.[95] While the Sixth Circuit may have the most reasonable approach among the imperfect options available, looking solely at the cases themselves, there is no obviously correct choice.

C. *Clearly Established Rights in the Fourth Circuit*

The Fourth Circuit has not explicitly spelled out its take on clearly established rights in light of *Hope* and *Brosseau*. Nor has it gone to the lengths the Eleventh Circuit has in setting up a detailed framework for the analysis.[96] In the last decade, however, the Fourth Circuit has been fairly generous in granting qualified immunity and, in doing so, has produced some remarkable decisions. For example, in *Robles v. Prince George's County*,[97] police officers from Prince George's County were attempting to transfer the recently arrested Nelson Robles to neighboring Montgomery County.[98] The officers handcuffed him to a metal pole in a deserted parking lot at 3:30 a.m.,

92. *See id.* at 604–06 (discussing Craighead v. Lee, 399 F.3d 954 (8th Cir. 2005)).

93. *See id.* at 607 n.264, 607–09.

94. *See id.* at 614 ("[W]ithout such unique and egregious facts, the matter at hand necessarily falls within the traditional *Anderson* and *Brosseau* line of cases that require qualified immunity to attach . . . ."). It is at least possible, however, that judges can consistently make these determinations. *See* Jacob Heller, *Abominable Acts*, 34 VT. L. REV. 311, 350–51 (2009) (arguing that judges are fully capable of recognizing truly "abominable" acts and denying qualified immunity in such cases).

95. *See* Golden & Hubbard, *supra* note 75, at 583 (arguing that the *Hope* decision may have been motivated by the Court's "visceral reaction" to the facts of the case).

96. *See supra* note 74.

97. 302 F.3d 262 (4th Cir. 2002).

98. *Id.* at 267.

leaving an unsigned note at his feet.[99] They drove off and then telephoned a non-emergency number for the Montgomery police without identifying themselves or relaying that Robles had been tied to a pole.[100] Montgomery police picked up Robles ten to fifteen minutes later.[101] Robles sued under § 1983 and state law, and the Fourth Circuit granted the Prince George's County officers qualified immunity.[102] In a footnote, the court disposed of *Hope* by essentially confining the case to its own facts: *Hope* "involved a much lengthier detention under painful and dangerous conditions amounting to cruel and unusual punishment" and therefore was not controlling.[103] The court then concluded that Robles had not satisfied *Anderson*'s preference for greater specificity; although Robles cited precedent involving "instances where detainees were subject to physical abuse or prolonged and inhumane conditions of detention," the conduct here was not so egregious.[104] The court admonished the officers' "Keystone Kop activity"[105] as degrading and found that they violated Robles' right to due process.[106] However, even though the officers were aware that their conduct was inappropriate, they could not have been reasonably expected to know it was *unconstitutional* in that particular context.[107]

In the more recent case of *Henry v. Purnell*,[108] the Fourth Circuit granted qualified immunity to a police officer who shot a fleeing, unarmed suspect with his pistol when he had intended to grab his Taser.[109] The court again emphasized the standard in *Anderson*, holding that because no case law existed addressing whether such "weapon confusion" by an officer was objectively reasonable or not, he could not have reasonably been expected to know that he was violating a clearly established right.[110]

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99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.* at 266.
103. *Id.* at 269 n.2.
104. *Id.* at 271.
105. The Keystone Kops were an incompetent police force featured in silent films in the early twentieth century. 6 NEW ENCYCLOPÆDIA BRITANNICA 825, 825 (15th ed. 1998).
106. *Robles*, 302 F.3d at 270–71.
107. *Id.*
108. 619 F.3d 323, 326 (4th Cir. 2010), *rev'd en banc*, 652 F.3d 524, 536–37 (4th Cir. 2011). The Fourth Circuit's reversal en banc is discussed in Part III.B, *infra*.
109. *Id.*
110. *Id.* at 337–38.

The Fourth Circuit has not been absolutely consistent in its requirement of spot-on precedent,[111] but even post-*Hope*, its general disposition has been clear: a plaintiff's allegedly violated rights must have been clearly established by precedent with a high level of factual similarity in order for the court to deny qualified immunity.[112] *Bellotte* demonstrates a shift away from this standard.

III. THE FOURTH CIRCUIT'S APPROACH IN *BELLOTTE*

In examining the issue of whether the Bellotte family's Fourth Amendment right to be free from an unlawful no-knock entry was clearly established, the Fourth Circuit found that it was, but did not frame the issue in terms of *Hope* and *Brosseau*. Still, the court seems to borrow from *Hope*—showing that the Fourth Circuit is now more willing to recognize clearly established rights in the absence of highly particularized precedent. Given the unsettled nature of qualified immunity law today, this is an entirely reasonable approach. Given how the court's approach balances government interests with preserving constitutional protections, it is also a desirable one. This Part examines the *Bellotte* court's reasoning and the Fourth Circuit's subsequent qualified immunity decisions.

111. *See* Turmon v. Jordan, 405 F.3d 202, 206 (4th Cir. 2005) (denying qualified immunity to a police officer who, upon noticing steam billowing from a motel-room window, yelled at the plaintiff to open the door and then pointed a gun in his face before roughly handcuffing him). The court held that "[a]lthough we have found no case exactly like this one, we believe that the longstanding requirement of reasonable suspicion . . . gave Jordan 'fair warning that his alleged treatment of [Turmon] was unconstitutional.' " *Id.* (second alteration in original) (quoting Jones v. Buchanan, 325 F.3d 520, 531 (4th Cir. 2003)); *see also* Amaechi v. West, 237 F.3d 356, 365–66 (4th Cir. 2001) (denying qualified immunity to an officer who kneaded the plaintiff's buttocks and penetrated her genitals with an ungloved hand while conducting a strip search).

112. *See, e.g.*, Fields v. Prater, 566 F.3d 381, 391 (4th Cir. 2009) (granting qualified immunity from a First Amendment claim against defendant members of a county board of supervisors who took political affiliation into account when selecting an agency director). Even though the Fourth Circuit had found such conduct unconstitutional in the context of appointing county registrars, no precedent dealt specifically with agency directors. *Id.* at 389; *see also* Waterman v. Batton, 393 F.3d 471, 482 (4th Cir. 2005) (granting qualified immunity to officers who shot and killed a fleeing suspect who posed no threat to the officers, as the officers had already shot the suspect several times). The *Waterman* court noted that "other circuits decided during [the relevant time] period that a passing risk to an officer does not authorize him to employ deadly force moments after he should have recognized the passing of the risk. However, this circuit did not." *Waterman*, 393 F.3d at 483 (citations omitted).

A. *The Court's Analysis in* Bellotte

The majority opinion began with a discussion of whether exigent circumstances justified the officers' no-knock entry into the Bellottes' home. The court concluded that the entry was not justified, as none of the officers' rationales were sufficiently particularized.[113] This analysis took up most of the opinion. Addressing the officers' claim to qualified immunity for the no-knock entry, on the other hand, took up all of one paragraph, and the majority cited to neither *Hope* nor *Brosseau*.[114] Perhaps the court believed the result in this case to be so clear that a more exhaustive analysis was unnecessary, or perhaps the court believed any attempt to harmonize the current state of qualified immunity law in any meaningful way was simply impossible. In any event, applying those cases directly, the result should not change. Even under *Brosseau*'s conservative interpretation of the *Hope* doctrine, *Bellotte* falls into the category of "obvious" cases where precedent squarely governing the precise issue at hand is not required.[115] Indeed, the court's emphasis on the "brashness" of the officer's conduct over the absence of highly similar precedent evokes this analysis.[116] However, it should be noted that the officers' conduct, while most unfortunate, cannot reasonably be said to equal that of the prison guards in *Hope*. Still, the officers' conduct went far beyond what the Fourth Circuit had previously found permissible.

The specific factors considered by the Fourth Circuit in determining whether an entry was justified—whether the suspected crime was inherently violent; whether the suspect had a history of violence; whether there was a real risk of the suspect committing suicide; and whether there were unlawfully owned firearms on the premises—demonstrate how the right claimed in *Bellotte* is a far cry from those "abstract rights" the Supreme Court rejected in *Anderson*.[117] The Bellottes' right to be free from a no-knock entry was not clearly established by a general constitutional provision. Rather, the presence of Fourth Circuit case law providing the factors to determine whether a no-knock entry was justified and the absence

113. Bellotte v. Edwards, 629 F.3d 415, 424 (4th Cir. 2011).

114. Curiously, the only citation made to either comes from the dissent, where Judge Wynn cites to *Hope* when laying out the basics of what qualified immunity is and why it is important. *Id.* at 428 (Wynn, J., dissenting in part).

115. *See supra* notes 72–74, 86 and accompanying text (discussing *Hope* as a case where no factually-specific precedent was required because it was an "obvious" case and *Brosseau*'s reference to *Hope* as an "obvious" case).

116. *See Bellotte*, 629 F.3d at 424.

117. 483 U.S. 635, 640–41 (1987).

of those factors made the case "obvious." Although the officers faced a somewhat novel situation, it does not take sophisticated legal reasoning to consider those factors here and conclude that, with none of them present, performing a no-knock entry could not be justified. This lack of requisite factors is similar to the issues considered in *Turmon v. Jordan*,[118] where the Fourth Circuit denied an officer qualified immunity from an excessive force claim because the "factors for measuring the governmental interests at stake [were] absent."[119] While the severity of the constitutional violations in *Turmon* and *Bellotte* should not be trivialized,[120] they also cannot be equated with the violations in *Hope*. This strongly suggests that a case should not necessarily have to shock the conscience to be obvious. Even ignoring *Hope* altogether and applying *Anderson*'s more particularized standard—one that is aimed at giving "practical guidance to a street-level official"[121]—the outcome still should not change, as the case law makes clear that no-knock entries are only permissible where police can make a particularized showing of risk. Because the officers in *Turmon* could only point to their own speculation, qualified immunity was properly denied.

Whatever the court's reasons for avoiding *Hope* and *Brosseau*, the *Bellotte* court's ultimate finding of a clearly established right was based on precedent at least somewhat removed from the facts of the case before it. Judge Wynn emphasized this in his dissent.[122] For example, the majority cited to *United States v. Grogins*[123] to illustrate how dealing with a crime "more closely connected with violence" could justify a no-knock entry.[124] However, because the suspect in that case was a "notorious drug dealer with a history of violence," wrote Judge Wynn, the case "did little to inform the officers here whether a no-knock entry into a suspected child abuser's home—where the suspect, multiple firearms, and the child victim were believed to be present—was lawful."[125] While the precedent relied on by the majority laid out factors that may amount to exigent circumstances, in Judge Wynn's opinion those cases did not provide

118. 405 F.3d 202 (4th Cir. 2005).

119. *Id.* at 207.

120. *See supra* note 111.

121. Jeffries, *supra* note 14, at 854.

122. Bellotte v. Edwards, 629 F.3d 415, 431 (4th Cir. 2011) (Wynn, J., dissenting in part).

123. 163 F.3d 795 (4th Cir. 1998).

124. *Bellotte*, 629 F.3d at 423 (majority opinion) (citing United States v. Grogins, 163 F.3d 795, 799 (4th Cir. 1998)).

125. *Id.* at 431 (Wynn, J., dissenting in part).

clear instructions to the officers in *this* particular situation. "Thus, there were no 'bright lines' demarcating the limits of a reasonable suspicion of danger under these circumstances," and therefore "no preexisting law clearly established the unlawfulness of this particular entry."[126] But the current state of qualified immunity law, muddled as it is, does not—and because *Hope* remains good law, should not—strictly require such precedent.

B. *Beyond* Bellotte

The *Bellotte* court signaled that the Fourth Circuit would be more willing to allow § 1983 claims to proceed to trial even when there is no precedent directly on point. Two months later, the Fourth Circuit decided another qualified immunity case. In *Brockington v. Boykins*,[127] Tim Brockington fell to the ground after being shot twice by Officer Boykins.[128] Brockington was unarmed. Then, Officer Boykins stood over the unarmed Brockington and fired six or more shots at point-blank range, rendering him a paraplegic.[129] Brockington conceded that the initial use of deadly force to subdue him was reasonable but argued that the ensuing shots violated his clearly established rights.[130] Officer Boykins claimed qualified immunity, arguing "that the right was not clearly established because, by virtue of the fact there were multiple shots, it was necessarily a gray area when further shooting became prohibited."[131] The court disagreed. Citing *Hope*, the court explained "it is not required that the exact conduct has been found unconstitutional in a previous case.... Indeed, it is just common sense that continuing to shoot someone who is already incapacitated is not justified under these circumstances."[132] *Garner* and other Fourth Circuit precedent, while addressing factually distinguishable situations, were enough.[133]

This trend continued several months later with the court's reversal of *Henry v. Purnell* (the mistaken weapon case) upon rehearing en banc.[134] Again, the court primarily based its decision on the general rule regarding deadly force from *Garner*.[135] Despite the

126. *Id.* at 432 (quoting Campbell v. Galloway, 483 F.3d 258, 271 (4th Cir. 2007)).
127. 637 F.3d 503 (4th Cir. 2011).
128. *Id.* at 505.
129. *Id.*
130. *Id.* at 507.
131. *Id.* at 508.
132. *Id.*
133. *See id.*
134. Henry v. Purnell, 652 F.3d 524, 527 (4th Cir. 2011) (en banc).
135. *Id.* at 536–37.

lack of precedent specifically addressing an officer accidentally grabbing the wrong weapon, the majority found the officer's actions to be objectively unreasonable: "a reasonable officer would have realized he was holding a firearm when shooting[,] . . . [and] it would have been clear to a reasonable officer that shooting a fleeing, nonthreatening misdemeanant with a firearm was unlawful."[136] As Judge Niemeyer noted in dissent, "it can readily be concluded that there is no clearly established law governing when such a mistake would be unreasonable under the Fourth Amendment."[137] Also dissenting, Judge Shedd pointed out how this decision produced an odd inconsistency with *Robles*[138]: if those foolish officers had been granted qualified immunity for their "Keystone Kop activity," how could Officer Purnell, who made an honest mistake, be denied?[139]

It appears the Fourth Circuit's view on qualified immunity has shifted in favor of plaintiffs. But even in the wake of this shift, the Fourth Circuit has still been cautious to award qualified immunity where the law truly offers government officers no clear guidance. In *Braun v. Maynard*,[140] police used an ion scanning machine to search for controlled substances on employees at the Maryland Department of Public Safety and Correctional Services.[141] The device signaled that drugs were present on several employees who were then searched. Nothing was discovered, and the employees subsequently brought a § 1983 claim alleging violation of their Fourth Amendment rights.[142] The trial court granted qualified immunity, and the Fourth Circuit affirmed, explaining that, "[a]lthough it was clearly established that intrusive prison employee searches require reasonable suspicion, it was far from clear that the devices at issue here could not meet that standard."[143]

Taken together, *Bellotte* and subsequent Fourth Circuit qualified immunity decisions demonstrate a reasonable, balanced approach to finding clearly established rights given the conflicting signals from the Supreme Court. Because the *Bellotte* approach does not require precedent that squarely addresses the circumstances, plaintiffs have a somewhat relaxed burden in showing that their rights were clearly

136. *Id.* at 534.
137. *Id.* at 555 (Niemeyer, J., dissenting).
138. *Robles v. Prince George's County* is discussed *supra* at notes 97–107.
139. *Henry*, 652 F.3d at 552 (Shedd, J., dissenting).
140. 652 F.3d 557 (4th Cir. 2011).
141. *Id.* at 558.
142. *Id.*
143. *Id.*

established, but government officers are still not expected to infer highly particularized rights from truly abstract, general rules.

IV. POLICY CONSIDERATIONS

Bellotte's relaxed standard for finding clearly established rights furthers two important policy objectives: (1) allowing more legitimate civil claims against government officers to survive summary judgment, thereby making it easier for victims of government abuse to recover damages, and (2) deterring unconstitutional, often dangerous no-knock entries.

Subjecting government officers to civil liability is one way to hold them accountable for abusing their publically entrusted power.[144] When qualified immunity is asserted as a defense to civil suits, there are two competing interests that must be carefully balanced: "compensating those who have been injured by official conduct and protecting government's ability to perform its traditional functions."[145] When that balance is unfairly tipped toward protecting the government, citizens and their constitutional rights necessarily suffer: because qualified immunity is generally decided on a pre-trial motion, fewer legitimate civil claims will survive summary judgment and reach the ears of a jury.[146] This is the natural consequence of the rigid approach to finding clearly established rights that was rejected in *Hope* and perhaps resurrected in *Brosseau*.[147] Even victims of the most extreme government abuse may be left without a remedy.[148]

The Supreme Court's decision in *Hudson v. Michigan* underscores how important civil liability may be in protecting constitutional rights. In that case, the Court held that evidence seized after an *unconstitutional* no-knock entry did *not* have to be excluded

144. *See* Golden & Hubbard, *supra* note 75, at 565–66.

145. Wyatt v. Cole, 504 U.S. 158, 167 (1992).

146. *See* Jeffries, *supra* note 14, at 863 ("If 'clearly established' law requires a prior ruling on similar facts, then defendants will be entitled to summary judgment whenever there happens to be no binding precedent precisely on point. This solves the summary judgment problem but only by grossly distorting qualified immunity.").

147. *See* Mark R. Brown, *The Fall and Rise of Qualified Immunity: From* Hope *to* Harris, 9 NEV. L.J. 185, 197 (2008) (stating that before the Supreme Court decided *Hope*, the Eleventh Circuit "became 'the circuit of "unqualified immunity." ' From roughly 1990 to 2002, constitutional victims' chances of winning money damages from government officials' [sic] in the Eleventh Circuit closely approached zero." (quoting Elizabeth J. Norman & Jacob E. Daly, *Statutory Civil Rights*, 53 MERCER L. REV. 1499, 1556 (2002))).

148. *See generally* Heller, *supra* note 94 (discussing cases of extreme government misconduct where the officers were nevertheless awarded qualified immunity).

at trial.[149] This removed one of, if not the, most powerful deterrents to such government misconduct.[150]

Now, only by letting more civil claims survive summary judgment, as the Fourth Circuit's new approach to qualified immunity looks to do, can courts give civil liability the teeth necessary to help reset the balance of interests at stake.

A. Avoiding Unconscionable Results and Promoting Government Accountability

As discussed above, a strict requirement of highly particularized precedent can produce shocking results. Larry Hope "was treated in a way antithetical to human dignity" by prison guards, yet the Eleventh Circuit still denied him relief.[151] Frederick Henry was shot and nearly robbed of his life by a police officer who made the profound mistake of firing his pistol instead of his Taser, yet the Fourth Circuit initially denied him relief as well.[152] The problem here is simple: if such results are allowed, qualified immunity is no longer a reasonable way to protect government officers from frivolous lawsuits; instead, it becomes an explicit and radical prioritization of the government over the individual.

This Recent Development does not suggest that government officers must be held liable for every mistake that leads to a distressing result. There have been and will be cases where a call in the line of duty goes the wrong way—perhaps even resulting in the death of an innocent person—and the officer responsible is rightfully protected by qualified immunity. For example, in *Milstead v. Kibler*,[153] police exchanged gunfire with a suspect in a house who had assaulted the residents inside.[154] At one point, "someone came crashing through the door 'in a run' and turned toward where Officer Kibler was positioned."[155] Kibler fired twice at the man he believed to be the assailant, killing him.[156] As it turned out, this person was not the assailant, but rather was Milstead, one of the residents trying to

149. *Hudson v. Michigan*, 547 U.S. 586, 594 (2006).

150. *See* Daniel A. Gutin, Note, *Technical Knockout:* Hudson v. Michigan *and the Unfortunate Demise of the Knock-and-Announce Rule*, 44 AM. CRIM. L. REV. 1239, 1262–66 (2007).

151. Hope v. Pelzer, 536 U.S. 730, 736, 745 (2002).

152. *See supra* notes 108–10 and accompanying text.

153. 243 F.3d 157 (4th Cir. 2001).

154. *Id.* at 160.

155. *Id.*

156. *Id.* at 160–61.

escape.[157] Because of poor lighting, Kibler's belief that Milstead had been shot and therefore could not run, and Kibler's knowledge that the assailant had a gun moments earlier, the Fourth Circuit found the mistake to be objectively reasonable and affirmed the district court's award of qualified immunity.[158]

The doctrine of qualified immunity acknowledges the grim reality that government officers are also humans—some mistakes are inevitable. However, if a constitutional violation is clearly established, to measure its reasonableness strictly by whether a court has previously decided a very similar case invites the system of accountability under § 1983 and *Bivens* to fail.[159] Under this approach, citizens would often enjoy their constitutional protections in name only.

B. Deterring Unconstitutional No-Knock Entries

Civil liability of government officers is especially important in the context of no-knock entries. The knock-and-announce rule is aimed at preventing unnecessary violence between civilians and police, avoiding unnecessary destruction of property, and preserving citizens' privacy interests.[160] Entries dispensing with the rule have increased "from 2,000 to 3,000 raids a year in the mid-1980s, to 70,000 to 80,000 annually"[161] and have recently produced some tragic results.[162] Although Justice Kennedy asserted in *Hudson* that there was no "widespread pattern" of unlawful no-knock entries,[163] Justice

157. *Id.* at 161.

158. *Id.* at 165.

159. *See* Jeffries, *supra* note 14, at 865 ("The search for a precedent specific to the circumstances presented in this case sets an almost impossible standard for clearly established law, effectively precluding vindication of constitutional rights through money damages." (internal quotation marks omitted)); *supra* note 10 (explaining a *Bivens* action).

160. Gutin, *supra* note 150, at 1241.

161. Ron Barnett & Paul Alongi, *Critics Knock No-Knock Police Raids*, USA TODAY (Aug. 3, 2008), http://www.usatoday.com/news/nation/2011-02-14-noknock14_ST_N.htm.

162. *See* Cecil Angel, Todd Spangler & George Sipple, *Conyers Seeks Federal Probe of Aiyana's Death*, DETROIT FREE PRESS (May 20, 2010), http://www.freep.com/article/20100520/NEWS01/5200591/Conyers-seeks-federal-probe-Aiyana-s-death; Editorial, *Better Planning Could Help Arrest Botched Police Raids*, USA TODAY (Apr. 25, 2004), http://www.usatoday.com/news/opinion/editorials/2004-04-25-our-view_x.htm; Brian Haas, *Parents of Man Shot by Police During Drug Raid File Lawsuit*, SUN-SENTINEL (Ft. Lauderdale, Fla.) (Mar. 17, 2007), http://articles.sun-sentinel.com/2007-03-17/news/0703160615_1_swat-team-drug-raid-grand-jury; Bill Rankin, *Atlanta Police Look To Restore Trust After Drug Raid Killing*, ATLANTA J. CONST. (Feb. 23, 2009), http://www.ajc.com/metro/content/metro/atlanta/stories/2009/02/23/johnston_sentencing.html.

163. Hudson v. Michigan, 547 U.S. 586, 604 (2006) (Kennedy, J., concurring in part and concurring in the judgment).

Breyer pointed out that there was in fact a well-documented multitude of knock-and-announce violations.[164] The *Bellotte* court recognized the gravity of the interests protected by the knock-and-announce requirement and that dispensing with the rule must be done carefully: "To permit a no-knock entry on facts this paltry would be to regularize the practice.... [T]he Fourth Amendment does not regard as reasonable an entry with echoes, however faint, of the totalitarian state."[165]

Before 2006, the exclusionary rule was the primary deterrent to knock-and-announce violations.[166] Police would be deterred from committing such violations if they knew that the evidence discovered in the ensuing search would be inadmissible at trial.[167] In *Hudson*, decided in 2006, the Supreme Court held that the exclusionary rule did not apply to evidence seized after an unconstitutional no-knock entry.[168] Writing for the majority, Justice Scalia explained how the Court could not "assume that exclusion in this context is necessary deterrence simply because we found that it was necessary deterrence in different contexts and long ago."[169] Since the birth of the exclusionary rule, he noted, civil liability of government officers had greatly expanded to include federal officers and to "reach the deep pocket of municipalities."[170] Citing four examples, Justice Scalia explained that qualified immunity did not present a significant burden to suits for knock-and-announce violations.[171] "As far as we know," he wrote, "civil liability is an effective deterrent ...."[172] This, combined with greater access to public interest lawyers, the "increasing professionalism of police forces," and more citizen review

164. *Id.* at 610 (Breyer, J., dissenting) (citing *The Warrant Requirement*, 34 GEO. L.J. ANN. REV. CRIM. PROC. 19, 31–35 (2005); William D. Bremer, Annotation, *What Constitutes Compliance with Knock-and-Announce Rule in Search of Private Premises—State Cases*, 85 A.L.R. 5TH 1 (2001)).

165. Bellotte v. Edwards, 629 F.3d 415, 421 (4th Cir. 2011).

166. *See Hudson*, 547 U.S. at 629 (Breyer, J., dissenting) ("[W]ithout suppression there is little to deter knock-and-announce violations."); *see also* Gutin, *supra* note 150, at 1246 (citing Mapp v. Ohio, 367 U.S. 643, 670 (1961) (Douglas, J., concurring)) (noting that the exclusionary rule is the most meaningful deterrent as compared with other remedies).

167. *See* David Alan Sklansky, *Is the Exclusionary Rule Obsolete?*, 5 OHIO ST. J. CRIM. L. 567, 582 (2008); Gutin, *supra* note 150, at 1246–47.

168. *Hudson*, 547 U.S. at 594.

169. *Id.* at 597.

170. *Id.* at 597–98.

171. *Id.* at 598.

172. *Id.*

boards, has apparently rendered the exclusionary rule in this context obsolete.[173]

In dissent, Justice Breyer called the majority's view on civil liability a "support-free assumption."[174] Even Michigan's amici believed that, due to the state of civil immunity doctrines, civil liability could not adequately replace the exclusionary rule.[175] Professor Sklansky has noted that "[m]ore and more, [immunity doctrines] look like the Blob That Ate Section 1983."[176] While Justice Scalia emphasized how civil liability has become a more effective deterrent to police misconduct since the 1960s, there is little evidence of this.[177] Nor is there strong evidence that the other regulating factors mentioned by Justice Scalia can make up the difference.[178]

We can fume about *Hudson* all we want,[179] but until the Supreme Court revisits no-knock entries, civil liability remains one of the last, best deterrents. While the *Hudson* majority opinion might be a thinly veiled attack on the exclusionary rule, its emphasis on civil liability as an effective deterrent must be taken at face value.[180] To play a truly significant role in filling the void of the exclusionary rule,[181] civil liability must become the effective deterrent the majority proclaimed it is already. For this to happen, courts must be more conservative in granting qualified immunity and allow more claims to survive summary judgment, just as the Fourth Circuit did in *Bellotte*.

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173. *Id.* at 598–99.

174. *Id.* at 611 (Breyer, J., dissenting).

175. *Id.* at 610.

176. Sklansky, *supra* note 167, at 572.

177. *Id.* at 580 (noting that far more cases are thrown out under the exclusionary rule than § 1983 claims filed, and most of those are unsuccessful); *see also* CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE 58–59 (4th ed. 2000) ("Under current law, a damages suit is not feasible when damages are negligible, as is the case with many Fourth Amendment (and other constitutional) violations, and the victim poor, as are most persons investigated by the police.").

178. Gutin, *supra* note 150, at 1262–64.

179. Professor LaFave does this especially well. *Hudson*, he says, "deserves a special niche in the Supreme Court's pantheon of Fourth Amendment jurisprudence, as one would be hard-pressed to find another case with so many bogus arguments piled atop one another." 6 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 11.4, at 52 (4th ed. Supp. 2011–2012).

180. *See* Sklansky, *supra* note 167, at 570.

181. Of course, because no criminal charges were ever filed, the exclusionary rule was of little help to the Bellottes after the raid. However, the officers may have hesitated before executing the no-knock entry had they thought it more likely that any fruits of the search would have been inadmissible.

V. ADDRESSING CONCERNS

The dangers of tipping the scales of qualified immunity in favor of the government are apparent, but what if the balance shifts too far the other way? If courts are less willing to grant qualified immunity, as the Fourth Circuit was in *Bellotte*, government officers may be subject to more litigation that inhibits them from performing their jobs effectively. They may be liable for their mistakes even though courts have not provided them situation-specific guidelines to avoid unconstitutional behavior. This could result in an undesirable "chilling effect" on officers who perform important and sometimes dangerous jobs. As the Fourth Circuit has noted, "[i]f every mistaken seizure were to subject police officers to personal liability under § 1983, those same officers would come to realize that the safe and cautious course was always to take no action."[182] If government officers were actually required to infer that their conduct was unconstitutional from highly generalized legal principles, this would naturally be the result.[183]

This, however, is not the case in the Fourth Circuit. First of all, in light of *Brosseau*, a showing of highly particularized precedent is still the Supreme Court's preferred way of determining clearly established rights.[184] Police and other government officers receive detailed training as to the constitutional rules they must work with every day.[185] However, simply because application of constitutional rules to real-world situations may not always be crystal clear does not mean officers should be immune whenever they get it wrong. To respect the rights of citizens, there must be some room in the equation for

182. Gooden v. Howard Cnty., 954 F.2d 960, 967 (4th Cir. 1992) (en banc).

183. *See* Golden & Hubbard, *supra* note 75, at 611 ("It is quite another level of complexity to try to survey all cases relevant to a determination of whether a defendant's conduct so obviously violates some generalized constitutional law principle that the defendant supposedly had fair warning that his conduct was constitutionally inappropriate.").

184. *See* Heller, *supra* note 94, at 320; *supra* Part II.A.

185. *See, e.g.*, Corey Fleming Hirokawa, Comment, *Making the "Law of the Land" the Law of the Street: How Police Academies Teach Evolving Fourth Amendment Law*, 49 EMORY L.J. 295, 319–27 (2000) (discussing how different police academies in and around Atlanta, Georgia, provide instruction on fluid Fourth Amendment concepts); *see also* Sklansky, *supra* note 167, at 581 (discussing how police academy materials in California provide instruction as to the constitutionality of garbage searches); Jacqueline Blaesi-Freed, Comment, *From Shield to Suit of Armor: Qualified Immunity and a Narrowing of Constitutional Rights in the Tenth Circuit*, 50 WASHBURN L.J. 203, 227 (2010) (explaining that some "circuits have held that officials must apply 'esoteric' doctrines in spite of their complicated nature").

common sense, common decency, and the ability of reasonable officers to apply these principles to somewhat unfamiliar situations.[186]

Second, considering how the more particularized standards in *Anderson* and *Brosseau* allow government officers to carry out their duties with minimal fear of harassing litigation, the only conduct that will truly be deterred is the kind of especially horrifying or plainly foolish conduct at issue in cases like *Hope*, *Robles*, and *Bellotte*. Courts remain free to grant qualified immunity to officers who make a bad guess in "gray areas" of law. The Fourth Circuit's recent qualified immunity decisions are illustrative. While the officers who conduct an entirely unjustified no-knock entry or shoot an injured, unarmed suspect multiple times at close range will be denied qualified immunity, officers who employ a new, high-tech crime-fighting technique that courts have never considered will be protected.[187]

CONCLUSION

Qualified immunity protects government officers from liability when they make reasonable mistakes. Given the often dangerous and difficult nature of their jobs, this is a good thing. However, the Supreme Court has not made clear what level of "clearly established" law is necessary to give government officers fair warning that their conduct may violate someone's constitutional rights. Until recently, the Fourth Circuit had required a highly particularized level of precedent. While this approach is relatively straight-forward in application, it also tends to make qualified immunity look more like absolute immunity. Government accountability and constitutional protections suffer as a result. *Bellotte* demonstrates how the Fourth Circuit has moved away from this highly deferential standard; it is now more willing to let civil suits proceed to trial even in the absence of case law "on all fours" with the conduct at issue. Given the uncertainty surrounding qualified immunity and the deeply important interests at stake, this is a reasonable, common-sense way to perform a difficult balancing act. Victims of government abuse get a fair chance at redress, yet government officers will not be so inhibited by the threat of a lawsuit as to significantly affect the performance of their duties. While efficient government operations and constitutional

186. *See* Henry v. Purnell, 652 F.3d 524, 536 (4th Cir. 2011) (en banc) ("Especially in light of the fact that the Taser and firearm were holstered on the same side of Purnell's body, a reasonable jury could conclude that [verification of the weapon] would only amount to common sense.").

187. *See supra* Part III.B.

freedoms may never live together in perfect harmony, this approach produces a lesser discord that we can more easily accept.

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